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IN THE

Supreme Court of the United States

OCTOBER TERM, 1942

No.———

AMERICAN AUTOMOBILE INSURANCE COMPANY, a Corporation, *Petitioner,*

vs.

EMPLOYERS MUTUAL CASUALTY COMPANY, a Corporation, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

To the Honorable Justices of the Supreme Court of the United States:

Your petitioner, American Automobile Insurance Company, respectfully shows to the Court:

I.
SUMMARY STATEMENT OF THE MATTER INVOLVED.

This is an action by a judgment creditor of one insured under an automobile liability insurance policy to recover the amount of its judgment from the liability insurer. The action was commenced in the District Court of the United States for the District of Kansas by W. C. McBride, Inc., a Delaware corporation, against respondent, Employers Mutual Casualty Corporation, an Iowa corporation. Subsequently, American Automobile Insurance Company, a Missouri corporation, and subrogee of W. C. McBride, Inc. was substituted as the party plaintiff. Also joined as defendants were the trustees of Miller-Morgan Motor Company, a dissolved Kansas corporation. (R. 56, 57) Jurisdiction was based upon diversity of citizenship. The trustees of Miller-Morgan Motor Company defaulted. After a trial of the action judgment was rendered in favor of your petitioner and against the respondent for $10,228.95 (R. 61). This judgment was reversed by the Circuit Court of Appeals for the Tenth Circuit. (R. 125).

On August 11, 1936, the respondent Employers Mutual Casualty Company, through its soliciting agent, issued and delivered to the Miller-Morgan Motor Company, a motor sales and repair agency, its public liability insurance policy covering a "courtesy car" owned by Miller-Morgan and intended for the temporary use of its customers while their automobiles were undergoing repair in Miller-Morgan's establishment. (R. 16, 57) At the specific request of Miller-Morgan the policy contained a so-called omnibus or additional insured clause,

which in addition to the named assured, covered the liability of any person while using the atomobile with the permission of the named assured (R. 57, 58). Soon thereafter, and on August 28, 1936, the soliciting agent for respondent Employers Mutual Casualty Company obtained the policy from Miller-Morgan for the purpose of making some changes. The policy was returned to Miller-Morgan with a rider attached which voided the omnibus clause in the policy and confined the coverage thereunder to Miller-Morgan Motor Company, the named insured. Miller-Morgan did not have knowledge of the attachment of the rider and did not consent thereto. It accepted the return of the policy as changed under the mistaken belief that the policy fully covered the operations of the courtesy car. There was no consideration for the change in the policy. (R. 58)

After the return of the policy as changed, and on September 5, 1936, Miller-Morgan temporarily loaned the courtesy car to its customer James L. Strunk, an employee of W. C. McBride, Inc. On that day, Strunk, while driving the car in the course of his employment with W. C. McBride, Inc., was involved in an automobile accident resulting in injuries to one Kenneth Stanfield. Stanfield instituted suit against W. C. McBride, Inc. and Strunk for personal injuries. Strunk notified the respondent, contending that he, Strunk, was an additional insured under the omnibus clause of the policy, which respondent had issued to Miller-Morgan Motor Company. Respondent denied liability and refused to defend on the ground that the policy in force on September 5, 1936, did not cover the automobile while operated by anyone other than the named insured Miller-Morgan Motor Company. W. C. McBride, Inc., through its in-

suror, your petitioner, American Automobile Insurance Company, effected a settlement with Stanfield which was judicially approved, paid the judgment, and W. C. McBride, Inc. was granted a judgment over against Strunk for the same amount. (R. 59)

W. C. McBride, Inc., as the judgment creditor of Strunk, instituted garnishment proceedings against respondent Employers Mutual Casualty Company on the theory that the change in the policy, being without consideration and lacking the assent of Miller-Morgan Motor Company, was a nullity and that by reason thereof, Strunk was an additional assured under the omnibus clause of the policy at the time of the accident, and that respondent was therefore bound to respond under the terms of the policy (R. 60). The named assured, Miller-Morgan Motor Company was not a party to this garnishment proceeding. (R. 104, *Stanfield v. McBride, Inc.,* 149 Kan. 567, 88 P. 2d 1002.) The Kansas trial court dismissed the garnishment proceedings holding that Strunk was not within the coverage of the policy unless it could be reformed to comply with its original terms and that reformation could not be had under the issues framed in a garnishment proceeding. (R. 60, 104)

From the judgment dismissing the garnishment proceeding W. C. McBride, Inc., whose position petitioner occupies, took an appeal to the Supreme Court of Kansas. (R. 60, 122) No cross-appeal was taken by the respondent from the state trial court's failure to render a judgment in its favor upon the merits. (R. 105, *Stanfield v. McBride, Inc.,* 149 Kan. 567, 88 P. 2d. 1002) The Kansas Supreme Court simply affirmed the judgment of the Kansas trial court dismissing the garnishment proceeding. (R. 60, 124) The court's opinion is reported

under the title *Stanfield v. McBride, Inc.*, 149 Kan. 567, 88 P. 2d. 1002. The opinion and judgment of the Kansas Supreme Court are included in the record only by reference. (R. 105)

The present action was filed during the pendency of the appeal in the Supreme Court of Kansas. (R. 60) The complaint alleged the facts substantially as above related except that it made no reference to the state court proceeding. (R. 7-13) The action was not tried until some time after the decision of the Kansas Supreme Court in *Stanfield v. McBride, Inc.*, supra. (R. 32)

The facts above related were found by the trial court in the present action. (R. 56-61) In its opinion the Circuit Court of Appeals held that the findings of the trial court were supported by substantial evidence and were conclusive in that court. (R. 123).

The only question presented to the Circuit Court of Appeals upon respondent's appeal from the judgment rendered against it by the trial court was the interpretation and effect of the decision of the Kansas Supreme Court in *Stanfield v. McBride, Inc.*, supra. (R. 121)

The District Court held that the decision of the Kansas Supreme Court was no bar to petitioner's right to maintain the action. (R. 61) The Circuit Court of Appeals held that this conclusion of law by the District Court was erroneous and reversed the judgment upon the ground that in *Stanfield v. McBride, Inc.*, supra, the Kansas Supreme Court laid down a rule of law that petitioner had no standing to assert that the change in the policy was invalid. (R. 124, 125)

The interpretation given by the Circuit Court of Appeals to the opinion and judgment of the Kansas Supreme Court was something of an anomaly. The court

held that the judgment of the Kansas Supreme Court was not *res judicata* of the issues in the present action because the court went no farther than to affirm a dismissal otherwise than upon the merits. (R. 124, paragraph 1.) The court further held, however, that in its opinion the Kansas Supreme Court intended to lay down a binding rule of law to the effect that a third party beneficiary under an insurance contract has no standing to assert the invalidity of a unilateral change unassented to by the insured and unsupported by a consideration, the effect of which was to cut off the rights of the third party beneficiary. (R. 124, second paragraph, et seq.) The court further interpreted the opinion as applying to every action even though all the parties to the contract were before the court; although the only matter actually before the Kansas Supreme Court and covered by its judgment was whether the invalidity of the attempted change in the contract could be litigated in a garnishment proceeding to which the other party to the contract, Miller-Morgan Motor Company, was not a party. (R. 124, first paragraph, et seq.) Although the Circuit Court of Appeals held that the opinion of the Kansas Supreme Court went beyond the matter presented to and decided by it, the extension of the opinion to matters not decided was said not to be dicta because the opinion was stated in "language too clear and relevant to be called dicta." (R. 124, first paragraph.)

II.
THE QUESTIONS INVOLVED.

This recitation brings us to the questions involved:

1. Whether the Circuit Court of Appeals was correct in its holding that in *Stanfield v. McBride, Inc.*, supra, the Kansas Supreme Court laid down a rule of law that a third party beneficiary of an insurance contract, having no vested interest, cannot assert that the policy was changed to eliminate his interest by an unilateral act of the insurer, unknown to and unassented to by the insured and unsupported by a consideration, even though all the parties to the contract are before the court.

2. Assuming the correctness of the interpretation of the Circuit Court of Appeals stated in the preceding question, whether the courts of the United States are bound by dicta of a local court where such dicta is in conflict with an earlier decision of the local court upon the precise point.

3. Whether the courts of the United States are required to accord to dicta of a local appellate court the effect of an authoritative decision where the local court holds that dicta in its opinions are binding upon no one.

III.
JURISDICTION.

This court has jurisdiction to review the judgment of the Circuit Court of Appeals by virtue of 28 U.S.C., sec. 347. The judgment of the Circuit Court of Appeals sought to be reviewed was entered on November 6, 1942. (R. 125) The date of this petition for certiorari is February 2, 1943.

IV.

REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT.

1. The Circuit Court of Appeals held that the judgment of the Kansas Supreme Court was not upon the merits, but that it was simply an affirmance of a judgment dismissing a garnishment proceeding because the relief sought could not be obtained in that form of proceeding. (R. 124, paragraph 1) It also held that the only thing in the opinion of the Kansas Supreme Court which was necessary to that judgment was the determination made by the Kansas Supreme Court that the relief sought was outside the issues raised by the garnishment proceeding. (R. 124, lines 1-6) Since the judgment was limited to this one point any expressions in the opinion to the effect that one in petitioner's position could not assert that the unilateral change in the policy was a nullity in a civil action in which all the parties to the contract were joined was necessarily dicta, whether it was positively stated or not. This dicta was in direct conflict with an earlier Kansas decision upon the precise point in *Sluder v. The National Americans,* 101 Kan. 320, 166 P. 482. The Sluder case is not mentioned in the opinion in *Stanfield v. McBride, Inc.* This court's decision in Erie *Rly. Company v. Tompkins,* 304 U. S. 64, 82 L. Ed. 1118, 58 S. Ct. 817, requires the lower Federal Courts to ascertain the local law in cases based upon diversity of citizenship. It is a matter of importance for these courts to have the guidance of this court upon the question of whether they are bound by dicta of a local appellate court where that dicta is in conflict with an earlier decision of the local appellate court upon the precise point.

2. It is a settled rule of law in Kansas that dicta of the Kansas Supreme Court is binding upon no one. (*State ex rel. v. Stonehouse Drainage District,* 152 Kan. 188, 102 P. 2d 1017.) It is a matter of importance that this court determine whether the Federal courts in applying local law are required or permitted to give to dicta of a local appellate court the effect of an authoritative decision when such dicta is not entitled to weight in the local courts. This is particularly important where the dicta conflicts with an earlier decision of the local court upon the precise point.

3. The Circuit Court of Appeals has given to dicta of the Kansas Supreme Court the binding effect of an authoritative decision. In doing so the decision of the Circuit Court of Appeals for the Tenth Circuit in the present case is in conflict with decisions of the Circuit Court of Appeals for the Fourth Circuit in the cases of *New England Mut. Life Ins. Company v. Mitchell,* 4 Cir., 118 F. 2d. 414, certiorari denied, 314 U. S. 629, 86 L. Ed. (Adv. Ops.) 72, 62 S. Ct. 60 and *Powell v. Maryland Trust Company,* 4 Cir., 125 F. 2d 260, certiorari denied 316 U. S. 671, 86 L. Ed. (Adv. Ops.) 937, 62 S. Ct. 1041.

4. The Circuit Court of Appeals completely misinterpreted the opinion of the Kansas Supreme Court in *Stanfield v. McBride Inc.,* supra. The Kansas court decided only the question presented to it—whether the invalidity of respondent's unilateral change in the contract could be litigated in a garnishment proceeding to which the insured, Miller-Morgan Motor Company was not a party. The Kansas court had no intention of overruling its earlier decision in *Sluder v. The National Americans,* 101 Kan. 320 166 P. 482 which was not mentioned in

Stanfield v. McBride, Inc., supra. The question of local law decided by the Circuit Court of Appeals is of great importance. Under the decision of the Circuit Court of Appeals a life insurer, engaged in business in Kansas but incorporated in some other state, may by fraud and without consideration induce the insured to surrender his policy, yet when the interest of the beneficiary attaches upon the death of the insured he cannot assert the invalidity of the cancellation of the policy. The decision of the Circuit Court of Appeals interprets the law of Kansas in such a way as to sanction fraud and recognize a wrong without a remedy in the face of a direct decision to the contrary in *Sluder v. The National Americans,* supra.

Wherefore, your petitioner prays that a writ of certiorari be issued out of and under the seal of this court, directed to the United States Circuit Court of Appeals for the Tenth Circuit, commanding said court to certify and send to this court, a full and complete transcript of the record and all proceedings of said Court of Appeals in this case, which was entitled in that court Employers Mutual Casualty Company, Appellant versus American Automobile Insurance Company, Appellee, to the end that said cause may be reviewed and determined by this court as provided by law, and that the judgment of the said Circuit Court of Appeals may be reversed by this honorable court.

HOWARD T. FLEESON,
WAYNE COULSON,
AUSTIN M. COWAN,
Of Wichita, Kansas,
Attorneys for Petitioner.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1942

No.———

AMERICAN AUTOMOBILE INSURANCE COMPANY, a Corporation, *Petitioner,*

vs.

EMPLOYERS MUTUAL CASUALTY COMPANY, a Corporation, *Respondent.*

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

I.

OPINIONS.

No opinion was filed by the District Court. Its conclusions of law are stated on pages 60 and 61 of the record. The opinion of the Circuit Court of Appeals (Circuit Judges Phillips, Bratton and Murrah sitting, opinion by Judge Murrah) was filed November 6, 1942. It is set out on pages 120 to 125 of the record and is reported in 131 F. 2d 924.

II.

JURISDICTION.

The basis for the court's jurisdiction is stated on page 7 of the annexed petition for certiorari.

III.

STATEMENT OF THE CASE.

The material facts are stated on pages 2 to 6 of the annexed petition for certiorari.

IV.

ARGUMENT.

A.

The Circuit Court of Appeals Erred in According to Dicta of the Kansas Supreme Court the Effect of Overruling an Earlier Kansas Decision Upon the Precise Point.

The Circuit Court of Appeals recognized in its opinion that the only judgment rendered in the Kansas trial court was that the garnishment proceeding should be dismissed because the relief sought could not be obtained in that type of proceeding. In its opinion the Circuit Court of Appeals stated:

> "The Kansas trial court held that the American could not have reformation in a garnishment proceedings on the sole ground that reformation of the contract was not within the limited scope of the remedy afforded by garnishment proceedings. It stopped there, it did not hold that the judgment creditor could not have reformation in a proper proceeding." (R. 123, line 33)

The Circuit Court of Appeals also recognized that the only judgment rendered by the Kansas Supreme Court in *Stanfield v. McBride, Inc.* was that the trial court's judgment dismissing the garnishment proceeding be affirmed. The Circuit Court of Appeals stated:

> "The Supreme Court of Kansas affirmed the trial court holding that although fraud had been asserted, it was not within the issues of the garnishment proceedings, and could not be litigated there. (R. 124, line 1) * * * Our decision here therefore does not turn on res judicata as urged * * * ." (R. 124, line 11)

The Circuit Court of Appeals also recognized that anything in the opinion going beyond the question presented, whether the trial court correctly determined that the relief sought could not be obtained in a garnishment proceeding, was unnecessary to the decision by the Kansas Supreme Court. In its opinion the Circuit Court of Appeals said:

> "The Supreme Court of Kansas affirmed the trial court, holding that although fraud had been asserted, it was not within the issues of the garnishment proceedings, and could not be litigated there. It could have doubtless stopped there without unduly curtailing an exposition of the law relevant to the issues raised by the appeal." (R. 124, line 1)

The quoted sentences are a plain holding that anything further stated in the opinion of the Kansas Supreme Court was dicta. Dicta is defined by the Kansas Supreme Court as an expression in its opinions relating to questions which are not "squarely involved and squarely presented." (*State ex rel., v. Stonehouse Drainange District,* 152 Kan. 188, 102 P. 2d 1017)

Following the sentence last quoted the opinion of the Circuit Court of Appeals continues as follows:

> "But it did not elect to confine its decision to the bare procedural question presented, and in language too clear and relevant to be called dicta, it prescribed the substantive as well as the procedural standards which must govern the right of the American to recover in this case." (R. 124, line 6)

The fact that the portion of the opinion which the Circuit Court of Appeals held laid down a rule of law binding upon it was stated in clear and relevant language did not make it any the less dicta. The character of dicta is not changed because it is stated in positive terms.

In its opinion the Circuit Court of Appeals also states:

> "In these proceedings, unlike the garnishment proceedings on which the Supreme Court's decision was based, Miller-Morgan is named as a party defendant to the proceedings, apparently on the theory that its presence as a party defendant would cure the fatal defect in the state court proceedings." (R. 124, line 38)

The Kansas Supreme Court could not have held in *Stanfield v. McBride, Inc.,* supra, that petitioner could not assert the invalidity of the policy change in an action to which Miller-Morgan was a party without indulging in dicta, because Miller-Morgan was not a party to the case being decided by the Kansas Supreme Court, a fact to which the Kansas court called attention on three separate occasions in its opinion. (*Stanfield v. McBride, Inc.,* 149 Kan. 567, at pages 570, 571, 88 P. 2d 1002, at

pages 1003, 1004) The Kansas Supreme Court could not have decided that petitioner was not entitled to assert the invalidity of the unilateral change in the policy in an ordinary civil action without its expression being dicta because that situation was not presented to the court.

That the judgment of the Circuit Court of Appeals was based upon the authoritative effect given to the dicta of the Kansas Supreme Court is shown by the following portions of the opinion:

> " * * *Our decision here therefore does not turn on res judicata as urged, but rather upon the controlling law of Kansas as announced by its Supreme Court under identical facts.
>
> "The Supreme Court of Kansas plainly held that if fraud be admitted in the effectuation of the change in the contract between the Employers and Miller-Morgan, by which the interest of Strunk therein was cut off, the change was not void but voidable, and until Miller-Morgan elected to rescind, it was valid and binding on all parties. The court further held that since Strunk's interest in the contract as a contingent insured did not attach until after his right therein had been cut off, he had no enforceable interest therein unless and until Miller-Morgan elected to assert the fraud and to effect a rescission of the change which eliminated Strunk from the coverage in the policy. The court significantly noted that Miller-Morgan was not a party to the proceedings, had not asserted the fraud, or asked for reformation; that since the parties to the contract had a lawful right to limit the coverage by attaching the rider which eliminated Strunk's interest therein before it had attached or accrued, the American occupied the position of a stranger to the contract and could not raise either the question of fraud or the sufficiency of the consideration, and we

do not understand that this holding is in conflict with the doctrine announced in *Sluder v. National Americans,* 166 Pac. 482." (R. 124, line 11)

* * * *

"We need not explore the dimensions of the rule announced by the Kansas court beyond the precise language of its pronouncement. It is sufficient for our decision here to say that the presence of Miller-Morgan in this law suit does not add or detract from the right of the American to recover under the contract, and that the same fatal bar to its right to recovery exists here as it did in the Kansas court. It cannot assert the apparent fraud and it therefore cannot have reformation." (R. 125, line 16)

The dicta which the Circuit Court of Appeals accepted as a statement of applicable local law was in direct conflict with an earlier decision of the Kansas Supreme Court in *Sluder v. The National Americans,* 101 Kan. 320, 166 P. 482. This case was not mentioned, much less overruled by the Kansas Supreme Court in *Stanfield v. McBride, Inc.,* supra. In the Sluder case, Alvena Craig was the owner of a certificate issued by defendant fraternal benefit society in which plaintiff was named beneficiary. The certificate provided that upon the death of Alvena Craig the beneficiary should receive $200.00 per annum for ten years. Shortly before her death Alvena Craig, then in the last stages of tuberculosis, wrote defendant asking that some arrangement be made whereby she might receive some benefit under the certificate if she would surrender it to the defendant. A contract was entered into which provided that in consideration of defendant's payment to Alvena Craig of the sum of $20 per month during her lifetime, but not exceeding twenty-four months, Alvena Craig surrendered

the certificate and all rights thereunder. *Plaintiff had no vested interest in the certificate.*

Plaintiff sued, alleging that Alvena Craig was mentally incompetent at the time she entered into the contract and surrendered the policy, and that the surrender was induced by fraud of defendant. Plaintiff was unable to establish the fraud but did establish incompetency. It was contended that plaintiff could not question the validity of the cancellation of the policy. In overruling this contention the court said:

> "It is insisted that the plaintiff had no such interest in the insurance as to warrant her in challenging the validity of the change in the contract, or the surrender of the original certificate. The general rule is that the insured has complete control of his contract and may cancel it entirely regardless of the wishes or the consent of the beneficiary. *If a change was actually effected and a new contract made the plaintiff lost all right she had in the certificate. However, if the insured did not have the mental capacity to transact business or make a new contract the original one remained in force, and it constituted the only contract existing between the parties.* If the insured died without making an effectual change of contract the rights of the plaintiff accrued and she became entitled to the benefits specified in the certificate the same as if no attempt had been made to change or cancel the original contract. Until the insured died the plaintiff only had an inchoate interest in the benefit certificate, but if she died without making an effectual change of the contract her inchoate interest became a contract right, and she became entitled to assert her rights under the certificate and to challenge the validity of any steps or action previously taken in opposition to her rights. (Citing Cases.)"

In the Sluder case the Kansas Supreme Court decided the precise point involved in the present action. In that case a donee beneficiary having no vested right was held entitled to assert the invalidity of a cancellation of an insurance policy, which was voidable because of lack of capacity of one of the parties to assert to the cancellation. In the present case petitioner asserts the invalidity of a unilateral cancellation of part of an insurance policy, which was utterly void because the insured, Miller-Morgan Motor Company, did not assent to the cancellation and because it was unsupported by a consideration.

It is true that in its opinion the Circuit Court of Appeals stated, " * * * we do not understand that this holding is in conflict with the doctrine announced in *Sluder v. National Americans,* 166 Pac. 482." (R. 124, line 35) No reason for this conclusion was stated in the opinion nor was any furnished in the brief filed by respondent in the Circuit Court of Appeals. The only distinction between the present case and the Sluder case is that one case involved a liability insurance contract while the other involved a life insurance contract. We find no expression in any reported case that the two policies are governed by different rules. In both cases the beneficiaries were donee beneficiaries having no vested right and in both cases the invalid cancellations were effected prior to the occurrence of the contingency upon which the rights of the beneficiary became absolute.

While there has been no decision upon the point by the Kansas Supreme Court, every court which has passed upon the question has held that liability insurance contracts are governed by exactly the same rules as life insurance contracts so far as the rights of beneficiaries to reform the contract as to recover upon the true contract

are concerned. (*A. Rose & Sons, Inc., v. Zurich General Accident & Liability Co., Limited,* 296 Pa. 206, 145 A. 813; *Tuzinska v. Ocean Accident & Guarantee Corporation, Limited,* 241 App. Div. 598, 272 N. Y. S. 593, 246 App. Div. 565, 283 N. Y. S. 1008, 272 N. Y. 449, 3 N. E. 2d. 864; *Binswanger v. Employers Liability Assurance Corp.* 224 Mo. App. 1025, 28 S. W. 2d. 448; *Hunt v. Century Indemnity Co.,* 58 R. I. 336, 192 A. 799; *Flanagan v. Harder,* 270 Mich. 288, 258 N. W. 633)

The rule of *Erie Rly. Company v. Tompkins* is of recent origin. In ascertaining local law the Federal courts are continually confronted with the problem of the effect to be given dicta of local appellate courts. Further guidance from this court is necessary. We recognize that considered dicta may be accorded some weight in determining local law in the absence of a definitive holding. Surely, however, dicta should not be accorded the effect of overruling a contrary definite holding *by inference.* That situation is presented by the judgment of the Circuit Court of Appeals.

B.

The Circuit Court of Appeals Erred in According to Dicta of the Kansas Supreme Court Greater Weight Than That to Which It Would Have Been Entitled in the Trial Courts of the State of Kansas.

It is settled law in Kansas that dicta of the Kansas Supreme Court is binding upon no one. The rule is stated in *State ex rel. v. Stonehouse Drainage District,* 152 Kan. 188, 102 P. 2d 1017, as follows:

> " * * * and if purchance we had so declared and such declaration was broader than the legal questions we then had to decide it would have been mere dictum and not binding either on future litigants or

the court if or when, as here, a precise question of law is presented for decision which was not involved in the prior litigation. In State v. Mercantile Co., 103 Kan. 896, 176 Pac. 670, it was said:

> "'We can only decide questions which are squarely involved and squarely presented in an appeal; and if the court should now give a dogmatic negative to . . . (a question not in issue) . . . , it would only be dictum and nobody would be bound by it.' (p. 897.)"

In ascertaining local law the Federal courts are just as much bound by determinations of local appellate courts as to the effect to be given to dicta in their opinions as they are by any other authoritative statement of local law. The effect of *Erie Rly. Co. v. Tompkins* is to place the Federal courts in exactly the same position as the local trial courts in applying local law. Under the law of Kansas as determined by its Supreme Court the inferior Kansas courts are not bound by dicta in the opinions of its Supreme Court. The Federal courts are no more entitled to accept dicta as an expression of the local law in the face of a definitive decision to the contrary than are the inferior courts of the State of Kansas. The Circuit Court of Appeals erred in doing so.

C.

In According to Dicta of the Kansas Supreme Court the Effect of an Authoritative Statement of Local Law the Circuit Court of Appeals Rendered a Decision in Conflict With the Decisions of the Circuit Court of Appeals for the Fourth Circuit.

The effect to be given dicta of a local court in determining local law is stated in *New England Mutual Life*

Ins. Co. v. Mitchell, 4 Cir., 118 F 2d 414, certiorari denied 314 U. S. 629, 86 L. Ed. (Adv. Ops.) 72, 62 S. Ct. 60, as follows:

> "In the light of the decision in the Darden case, we do not think that the dictum in the Massey case upon which plaintiff relies has even persuasive value. But we would not feel bound to follow it in any event. We recognize, of course, our duty to ascertain and apply the law of Virginia to the facts of the case; but mere dicta have never been received as conclusive evidence of the law of any state, and clearly they ought not to be followed when opposed to what we regard as the sound and reasonable rule arising out of the common law of the state. As said by the Supreme Court of the United States in Carroll v. Carroll, 16 How. 275, 286, 14 L. Ed. 936, a case involving the interpretation of a state statute where the court was bound to ascertain and apply the state law: 'If the Court of Appeals had found it necessary to construe a statute of that state in order to decide upon the rights of parties subject to its judicial control, such a decision, deliberately made, might have been taken by this court as a basis on which to rest our judgment. But it must be remembered that we are bound to decide a question of local law, upon which the rights of parties depend, as well as every other question, as we find it ought to be decided. In making the examination preparatory to this finding, this court has followed two rules, one of which belongs to the common law, and the other is a part of our peculiar judicial system. The first is the maxim of the common law, stare decisis. The second grows out of the thirty-fourth section of the Judiciary Act (1 Stat. at L., 92) (28 U. S. C. A. sec. 725), which makes the laws of the several states the rules of decision in trials at the common law; and in as much as the states have committed to their respective judiciaries the power to construe and fix

the meaning of the statutes passed by their legislatures, this court has taken such constructions as part of the law of the state, and has administered the law as thus construed. But this rule has grown up and been held with constant reference to the other rule, stare decisis; and it is only so far and in such cases as this latter rule can operate, that the other has any effect.'

"And after stating that the construction put by a state court upon a statute is not a decision to be followed within the stare decisis rule unless this was necessary to the determination of the rights of the parties before the court the court went on to give the reason for the rule that dicta are without binding authority as follows:

> " 'And therefore this court and other courts organized under the common law, has never held itself bound by any part of an opinion, in any case, which was not needful to the ascertainment of the right or title in question between the parties. In *Cohens v. State of Virginia,* 6 Wheat. (264) 399 (5 L. Ed. 257) this court was much pressed with some portion of its opinion in the case of *Marbury v. Madison* (1 Cranch 137, 2 L. Ed. 60). And Mr. Chief Justice Marshall said, 'It is a maxim not to be disregarded that general expressions in every opinion are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit, when the very point is presented. The reason of this maxim is obvious. The question actually before the court is investigated with care, and considered in its full extent; other principles which may serve to illustrate it are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated.' The cases of

(In re City Bank) Ex parte Christy, 3 How. 292 (11 L. Ed. 603), and Peck v. Jenness, 7 (How.) 612 (12 L. Ed. 841), are an illustration of the rule that any opinion given here or elsewhere cannot be relied on as a binding authority, unless the case called for its expression. Its weight of reason must depend on what it contains.'

"Nothing in recent decisions has in anywise weakened this rule or the sound basis of reason upon which it rests. In ascertaining the applicable law of the state, we are to consider court decisions and other available sources of local law; and we are to apply court decisions in the light of the well-established stare decisis rule and its limitations. *Cf. West v. American Tel. & Tel. Co.*, 61 S. Ct. 179, 85 L. Ed. ..... We are not required, however, to speculate as to how the state court might decide the question before us if it has not already decided it. Nor should we surrender our own judgment as to what the local law is on account of dicta or other chance expressions of the judges of the local courts. The respectful attitude towards the local court, where there has been no decision on the precise question before us, is to consider that question in the light of the common law of the state, with a view of reaching the decision which reason dictates, and with the faith that the local court will reach the same decision when the question comes before it. To base a decision upon dicta, or upon speculation as to what the local court might decide in the light of dicta, would be to depart from our solemn duty in the premises and embark upon a vain and illusory enterprise."

To the same effect is the more recent decision of the same court in *Powell v. Maryland Trust Company,* 4 Cir., 125 F. 2d 260, certiorari denied 316 U. S. 671, 86 L. Ed. (Adv. Ops.) 937, 62 S. Ct. 1041.

The decision of the Circuit Court of Appeals in the present case is in conflict with the cases from the Fourth Circuit above cited insofar as it gives to dicta the binding effect of an authoritative statement of local law. The conflict is the more marked because the Circuit Court of Appeals in the present case has accorded to dicta the effect of overruling by implication an earlier Kansas decision upon the precise point. The conflict is important because the problem of the effect to be given dicta arises in so large a percentage of cases presented to the Federal courts for determination. The conflict should be resolved so that the several Circuit Courts of Appeals may follow uniform rules of ascertaining what the local law is.

D.

The Circuit Court of Appeals Erred in Interpreting the Opinion in Stanfield v. McBride, Inc. as a Holding That a Third Party Beneficiary Has No Standing to Question the Validity of a Change in an Insurance Contract Which Cuts Off His Rights.

Kansas is primarily an agricultural state. The overwhelming majority of the insurance companies engaged in business in Kansas are incorporated in states other than Kansas and are entitled to a determination in the United States courts of all controversies with citizens of Kansas where the amount in controversy exceeds $3,000. Under the decision of the Circuit Court of Appeals an insurance company may wrongfully cancel or change its contract without the knowledge or consent of the insured, yet after the contingency upon which the rights of the beneficiary attach he still cannot assert the void or voidable change in the policy. Such a rule of law sanctions fraud and permits a wrong without a remedy. Since so many controversies between insurance companies and

citizens of Kansas are within the jurisdiction of the Federal courts, several more cases involving the identical point may come before the United States District Court for the District of Kansas before the Kansas Supreme Court can correct the erroneous interpretation placed upon its opinion in *Stanfield v. McBride, Inc.* by the Circuit Court of Appeals in the present case.

The Circuit Court of Appeals has completely misinterpreted the opinion in *Stanfield v. McBride, Inc.*, 149 Kan. 567, 88 P. 2d 1002.

The opinion was required to be interpreted in the light of the particular facts to which it was applied. (*Foresman v. Foresman*, 103 Kan. 698, 176 P. 147; *Maresh v. Peoria Life Ins. Co.*, 133 Kan. 654, 3 P. 2d 634; *State v. Reed*, 145 Kan. 459, 65 P. 2d 1083.)

The judgment of the Kansas trial court in the garnishment proceeding was one of dismissal upon the ground that the relief sought was outside the limited scope of a garnishment proceeding. (R. 60, 105, 123, *Stanfield v. McBride, Inc.*, supra). The only appeal taken from this judgment was by W. C. McBride, Inc., whose position petitioner occupies. (R. 59, 102, 120, 122, *Stanfield v. McBride, Inc.*, supra.) Respondent could have taken a cross-appeal from the trial court's failure to render a judgment in its favor upon the merits by virtue of G. S. 1941 Supp. 60-3314 which provides:

> "When notice of appeal has been served in a case and the appellee desires to have a review of rulings and decisions of which he complains, he shall within twenty days after the notice of appeal is filed with the clerk of the trial court, give notice to the adverse party, or his attorney of record, of his cross-appeal and file the same with the clerk of the trial court, who shall forthwith forward a duly attested copy of it to the clerk of the supreme court."

The case came before the Kansas Supreme Court upon W. C. McBride's appeal alone. In that state of the record the court could have reversed the case and ordered judgment for W. C. McBride, Inc., it could have ordered a new trial, or it could have affirmed the judgment of the trial court. One thing it could not do was to order a judgment upon the merits in favor of the present appellant, Employers Mutual Casualty Company, because no cross-appeal had been taken. (*Lebanon State Bank v. Finch,* 137 Kan. 114, 19 P. 2d 709; *Jones v. Pohl,* 151 Kan. 92, 98 P. 2d 175.) The question of whether the invalidity of the attempted modification of appellant's insurance policy could be litigated in an ordinary civil action to which the other party to the contract, Miller-Morgan Motor Company, was a party, was not raised, briefed, nor argued. The opinion must be interpreted in the light of the question before the court, bearing in mind the limited scope of the court's review of the judgment of the trial court.

It is made perfectly plain in the opinion that the sole basis for the court's conclusion was the absence of Miller-Morgan Motor Company, one of the parties to the insurance contract, as a party to the garnishment proceeding. On pages 1002 and 1003 of 88 P. 2d 1002 (149 Kan. 567-570) the court concisely states the facts. In the last paragraph on page 1003, (149 Kan. 570) the court begins its discussion of the legal questions before it. In this paragraph the court states:

> "The Miller-Morgan Motor Company are not parties to this lawsuit. The policy was issued to them. * * *"

Everything which follows in the opinion must be read in conjunction with this statement which is reiterated on two more occasions in the opinion. (88P. 2d 1004, 149 Kan. 571.)

In the next paragraph of the opinion at the top of page 1004 (149 Kan. 570) the court states:

> "The ultimate question to be determined may be formulated thus: Where a contract is entered into for the benefit of a third person as beneficiary, does such beneficiary acquire a right at once upon the making of the contract and does such right become immediately indefeasible? May the original parties to a contract made for the benefit of a third person as beneficiary prior to the time such beneficiary has knowledge of such contract, or has acted upon the faith of such contract, or has in anywise changed his position, modify or discharge such contract?"

The court's question, quoted above, answers itself and is of importance only as the court points out that the question of whether a change had actually been effected could only be determined in an action to which both Miller-Morgan Motor Company and Employers Mutual Casualty Company were parties.

The court answers its question as follows: (88P. 2d p. 1004, 149 Kan. 571).

> "While no case directly in point has been called to our attention, we are clear that the original parties could by mutual consent, under the circumstances stated, modify the insurance contract by attaching the rider thereto."

In the following sentence of the opinion the court states the only question which it decided and the only question discussed in the opinion as follows, *"Could such change in the contract be questioned by the plaintiff McBride under the issues framed in the garnishment proceedings, the insured motor company not being joined as a party?"*

In the same and in the succeeding paragraph of the opinion the court distinguishes the case of *Riddle v. Rankin,* 146 Kan. 316, 69 P. 2d 722, upon the ground that in that case the insured was a party to the proceedings. The Stanfield case was identical with the Riddle case in every other respect.

On page 1005 (149 Kan. 572) the court states:

> "Complaint is made of the exclusion of testimony to show the rider was attached through fraud. Although our statute G. S. 1935, 60-951, provides that the proceedings against a garnishee shall be deemed an action against the garnishee and defendant as parties defendant, no issue of fraud was raised in the garnishment proceedings. There was no error in the exclusion of such testimony."

It is clear from the opinion as a whole that the reason the court held that the evidence was properly excluded was that the court adopted the view that the defrauded party Miller-Morgan Motor Company was a necessary party to any action in which a determination that the named assured had been defrauded was sought. In the present case want of assent to the change by the assured, Miller-Morgan, was directly raised by the pleadings and Miller-Morgan's successors were joined as parties.

On the same page of the opinion (149 Kan. 572) the court states:

"The evidence in this case fails to show that Miller-Morgan has elected to rescind the change in the policy. It does not show they are dissatisfied with the policy in its present form. The rider was attached August 28, 1936, yet Miller-Morgan, the insured thereunder, has never attempted to avoid it. This raises a strong presumption that the action of the agent of the defendant insurance company in attaching the rider was ratified by the insured, the Miller-Morgan Motor Company. The burden was on the plaintiff to establish his cause of action. As a condition precedent to his right of recovery it was necessary for the plaintiff to show that the omnibus clause had not been deleted from the original contract. That fact has not been established."

The basis for the court's statement is the view, expressed throughout the opinion, that Miller-Morgan Motor Company was an indispensable party to any proceeding to determine whether a valid change in the contract had been effected. The situation in the case at bar is vastly different from that mentioned in the quoted paragraph. In the case at bar the trial court found as a fact that no officer or agent of the Miller-Morgan Motor Company knew of the attachment of the rider deleting the omnibus clause until after the accident in which Strunk injured the Stanfield child. (R. 59.) As a conclusion of law, which necessarily resulted from this finding, the trial court held that Miller-Morgan Motor Company had not consented to the attachment of the rider. (R. 60) These findings and conclusions were approved by the Circuit Court of Appeals. (R. 123, line 23.)

From the moment the accident occurred the rights of the parties became fixed and any subsequent consent or ratification (there was none) would not have altered the rights of the parties one iota. (*Spann v. Commercial Standard Ins. Co.*, 8 Cir., 82 F. 2d 593)

Everything contained in the opinion was written in discussing the only question presented to and decided by the court, which it stated to be, "Could such change in the contract be questioned by the plaintiff McBride under the issues framed in the garnishment proceedings, the insured motor company not being joined as a party?" (149 Kan. 571, 88 P. 2d 1004). The Circuit Court of Appeals does violence to the opinion by ascribing to the Kansas Supreme Court an intention to lay down a rule of law sanctioning fraud in relation to a situation not before the court.

CONCLUSION.

We submit that the questions raised by the petition are of such importance as to justify their consideration by this court and that the petition should be granted.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1942

No. 700.

AMERICAN AUTOMOBILE INSURANCE COMPANY, a Corporation, *Petitioner*,

vs.

EMPLOYERS MUTUAL CASUALTY COMPANY, a Corporation, *Respondent*.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI AND SUPPORTING BRIEF.

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IN THE

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No. 700.

AMERICAN AUTOMOBILE INSURANCE COMPANY, a Corporation, *Petitioner,*

vs.

EMPLOYERS MUTUAL CASUALTY COMPANY, a Corporation, *Respondent.*

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI AND SUPPORTING BRIEF.

MAY IT PLEASE THE COURT:

Your Respondent, Employers Mutual Casualty Company, in opposition to the petition for writ of certiorari and supporting brief, respectfully shows to this Honorable Court:

A.
Summary of Matter Involved.

The summary statement at pages 2 to 6, inclusive, of Petitioner's petition and brief is, on the whole, adequate. However, we take the following exceptions thereto:

1. Petitioner's initial statement—that this action was instituted by the judgment creditor "of one insured under an automobile liability insurance policy" (p. 2)—assumes the very issue in controversy before the Circuit Court of Appeals, which issue was resolved against Petitioner.

2. Miller-Morgan did not, as is stated in the last sentence at the bottom of page 2 of the petition, specifically request that its policy contain an "omnibus or additional insured clause". It merely related to Respondent's agent a past incident against repetition of which it desired its policy to protect (R. 57). That an omnibus clause was essential to afford such protection is an assumption, only, of Petitioner.

3. At page 3 the petition states:

> "Miller-Morgan did not have knowledge of the attachment of the rider and did not consent thereto."

The undisputed evidence was that G. C. Temple, office manager of Miller-Morgan (R. 57), surrendered the policy to Respondent at Respondent's request, *for the express purpose of permitting Respondent to make a change in the policy* (R. 58, 67, 71). Respondent told Temple it wanted the policy in order to "have some of the provisions restricted from the policy" (R. 67). The trial court so found (R. 58). The rider was attached when the policy was returned (R. 58). Therefore, Miller-Morgan did know the rider had been attached, although it did not know, the court found, that the rider deleted omnibus coverage (R. 59)—i. e., the *fact* of the rider was known, although its *effect* was unknown.

4. The petition, page 3, states, "There was no consideration for the change in the policy", citing "R. 58". This is a conclusion of law, not a statement of fact. The only factual finding was that no premium was refunded (R. 58-59).

5. The last paragraph of Petitioner's statement (page 5, last three lines, and page 6) is purely argumentative. All contentions there urged are reiterated in the petition and brief, and will be disputed at appropriate portions of Respondent's ensuing argument.

B.
Questions Presented.

Although confined to the three questions posed by Petitioner (petition, p. 7), Respondent would suggest the following supplementation:

1. Question "1" should embrace these additional facts: (a) the "third party beneficiary" was not designated in the policy and was neither identified nor identifiable prior to the accident (R. 19); (b) the fact, although not the effect, of the policy change was known to the named assured (R. 58, 67, 71); (c) the named assured, and, after its disolution (R. 64), its trustees, were capable of litigating the issue of the rider's validity, but (d) although those trustees were parties to the instant action they did not elect to litigate such issue or seek affirmative relief, permitting judgment to go by default (R. 125).

2. Question "2" should, Respondent feels, quaere (a) whether the relevant language in the Kansas Supreme Court opinion is dictum, and, if so, (b) whether it be *obiter* dictum or *judicial,* considered dictum; (c) whether, if it be dictum, the Circuit Court of Appeals is *re-*

quired to *ignore* it (as distinguished from being compelled to follow it) in ascertaining Kansas law; and (d) whether it does conflict with an earlier Kansas decision.

3. Respondent likewise submits that question "3" should inquire whether the federal courts *may* — not "must" — *consider* — not accord authoritative effect to, necessarily—*judicial, considered* dictum of the state court where that state court has said its *obiter* dictum binds no one.

4. An additional, overall question is necessarily involved: whether, in any event, the issues in the case at bar are of such character and gravity as to warrant issuance of a writ of certiorari.

C.

Jurisdictional Statement.

(1) Jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended (Feb. 13, 1925, c. 299, § 1, 43 Stat. 938; Jan. 31, 1928, c. 14,§ 1, 45 Stat. 54; June 7, 1934, c. 426, 48 Stat. 926), being now 28 U. S. C. A. § 347.

(2) Judgment of the Circuit Court of Appeals was entered November 6, 1942 (R. 125). Petition for writ of certiorari was filed February 3, 1943.

D.

Opinions Below.

The District Court filed no opinion. Its findings of fact appear at pages 56 to 60 of the Record, and its conclusions of law at pages 60 to 61.

The opinion of the Circuit Court of Appeals is reported in 131 F. (2d) (Advance Sheet number 7) 802 (Nov. 6, 1942).

E.

Argument.

I.

The Circuit Court of Appeals Neither Accorded Undue Effect to the Kansas Supreme Court Opinion Nor Ignored Any Earlier Kansas Decisions in Point.

Petitioner first asserts the language of the opinion in *Stanfield v. McBride,* 149 Kan. 567, 88 P. (2d) 1002 (1939), relied upon by the Circuit Court of Appeals in determining the instant case, is pure dictum.

With this Respondent does not agree. True, the trial court in *Stanfield v. McBride, supra,* entered judgment for defendant upon the narrow, technical ground:

> "That is the relief sought to be obtained in this garnishment action, reformation of the policy, but reformation of an instrument is *not within the issues raised by the pleadings . . .* " (*Stanfield v. McBride, supra,* 149 Kan. at 569, 570, 88 P. (2d) at 1003; italics supplied.)

True, too, the Kansas Supreme Court, on appeal, affirmed that judgment. But it was not required, in so doing, to adopt the theory and reasons of the trial court (*La Harpe Farmers Union v. U. S. F. & G. Co.,* 134 Kan. 826, 8 P. (2d) 354, 1932; *Shelley v. Sentinel Life Ins. Co.,* 146 Kan. 227, 69 P. (2d) 737, 1937). Nor, Respondent contends and the Circuit Court held, did the Kansas Supreme Court in fact confine its opinion of affirmance to the technical theory of the trial court. This is not surprising inasmuch as the Kansas statute (General Statutes of Kansas, 1935, Chap. 60-948) provides there shall be *no pleadings* in garnishment actions, and there were none, in fact, in that case.

Since the Kansas Supreme Court felt the result reached by the trial court was correct, it quite properly affirmed the judgment although upon a different ground, thereby applying the rule that appellate courts should affirm any judgment wherein the trial court attains a correct result even though upon an erroneous theory (*State,* ex rel., *v. Iola Theatre Corp.,* 136 Kan. 411, 414, 15 P. (2d) 459, 461, 1932; *McKenzie v. New York Life Ins. Co.,* 153 Kan. 439, 441-442, 112 P. (2d) 86, 87, 1941).

Since the Kansas Supreme Court, in formulating the language relied upon herein by the Circuit Court of Appeals, was stating its reasons for affirming the judgment, which reasons were pertinent to the issues involved, Respondent submits that language is not dictum.

It should here be noted that the issue for determination on the instant petition is *not* whether the Kansas Supreme Court's rationale in the Stanfield case is *res judicata.* We are not concerned here with whether the Stanfield judgment was a final adjudication upon the merits or a simple affirmance of a procedural judgment. Nor is it material to the instant issue whether Respondent did or did not perfect a cross-appeal in the Stanfield case (Brief of Petitioner, pp. 25-26). Granting, *arguendo,* that the Kansas Supreme Court could not render a final adjudication upon the merits in view of the state of the record in the Stanfield appeal, and that in determining the effect of that opinion as *res judicata* only the judgment itself and not the reasons advanced by the court may be considered, it does not follow that those reasons are dicta. Irrespective of what *kind* of judgment the Kansas Supreme Court was authorized to render, the pertinent grounds upon which the court based that judgment are decision, not dicta.

Incidentally, we note that Petitioner construes the Kansas opinion as holding that Petitioner could not recover in that action *because Miller-Morgan was not a party thereto.* This appears inconsistent with Petitioner's contention that the Kansas Supreme Court merely affirmed the action of the trial court for the reason that reformation was not an issue raised by the garnishment pleadings.

Petitioner also argues (Brief, p. 14):

> "The Kansas Supreme Court could not have held in *Stanfield v. McBride, Inc.*, supra, that petitioner could not assert the invalidity of the policy change in an action to which Miller-Morgan was a party without indulging in dicta, because Miller-Morgan was not a party to the case being decided by the Kansas Supreme Court."

Even if correct, that statement is wide of the present mark. Respondent contends and the Circuit Court of Appeals held, that the *ratio decidendi* of the Stanfield opinion was not merely Miller-Morgan's absence as a party litigant, but, instead, was Miller-Morgan's failure to elect to litigate the issue of the rider's validity. That is, the Kansas Supreme Court held that until Miller-Morgan came into court and elected to rescind the rider, Petitioner had no cause of action. *Miller-Morgan's failure to so act was an existing fact in the Stanfield case* (as, also, in the case at bar). Therefore when the court held Petitioner could maintain no suit until and unless Miller-Morgan elected to rescind the rider, it was not enunciating dicta upon a supositititious state of facts not present in that case; and this is necessarily true even though Miller-Morgan was not a party to the Stanfield action.

Petitioner places considerable reliance upon the Circuit Court's statement that the Kansas Supreme Court, having held fraud was not within the issues of the garnishment proceedings, "*could have* doubtless stopped there" (Brief, p. 13; emphasis supplied). Respondent might question the correctness of the quoted statement since the Stanfield case also involved the question of lack of consideration and mutual assent, which issue was not disposed of by a holding that *fraud* was beyond the scope of the action. However, that the Kansas Supreme Court might have placed its decision upon a single ground does not establish that additional grounds actually adopted by the court constitute dicta.

It is not the practice of courts to rest their decisions upon a single ground or upon the narrowest possible basis of fact; on the contrary, every consideration directly controlling the actual issues tendered is a legitimate *ratio decidendi,* every proposition of law or fact presented which will defeat a plaintiff's claim is germane to the decision, and the court's opinion thereon is not obiter dictum even though that opinion also disposes of other propositions in a manner which would be determinative of the entire case. See *Chicago, B. & Q. R. Co. v. Board of Sup'rs of Appanoose County, Iowa,* 182 Fed. 291 (C. C. A. 8, 1910). It is, in fact, well settled that an appellate determination upon one ground is not dictum merely because the court's conclusion on another ground would alone suffice to decide the case (*Florida Cent. R. R. Co. v. Schutte,* 103 U. S. 118, 143, 26 L. ed. 327, 336, 1881; *Weedin v. Tayokichi Yamada,* 4 F. (2) 455, C. C. A. 9, 1925; *Watson v. St. Louis, I. M. & S. Ry. Co.,* 169 Fed. 942, E. D. Ark., 1909, *aff'd.* 223 U. S. 745, 56 L. ed. 639; *Wagner v. Corn Products Refining Co.,* 28 F. (2d) 617,

D. N. J., 1928; *Parsons v. Federal Realty Corporation,* 105 Fla. 105, 143 So. 912, 1931).

Compare the rule, distinguishing between dicta and alternative propositions (*Maddox v. U. S.,* 5 Ct. Cl. 372, *aff'd.* 82 U. S. 58, 15 Wall. 58, 21 L. ed. 61, 1872), that if an appellate court bases its decision upon two or more distinct grounds, no one of those grounds may be labeled dictum, but each is the judgment of the court (*Union Pac. R. Co. v. Mason City & Ft. D. R. Co.,* 199 U. S. 160, 50 L. ed. 134, 1905; *U. S. v. Title Insurance & Trust Co.,* 265 U. S. 472, 68 L. ed. 1110, 1924; *Van Dyke v. Parker,* 83 F. (2d) 35, C. C. A. 9, 1936; *Union Pac. R. Co. v. Mason City & Ft. D. R. Co.,* 128 Fed. 230, C. C. A. 8, 1904; *Jones v. Mutual Creamery,* 81 Utah 223, 17 P. (2d) 256, 1932; *Coombs v. Getz,* 217 Cal. 320, 18 P. (2d) 939, 1933).

Certainly any given reason for a court's conclusion is not obiter dictum merely because another reason is more fully argued and considered (*Richmond Screw Anchor Co. v. U. S.,* 275 U. S. 331, 340, 72 L. ed. 303, 306, 1928); and where, as here, the theory in question furnishes the entire basis for the Kansas Supreme Court's decision, it cannot be regarded as dictum (*Eisner v. Macomber,* 252 U. S. 189, 204-205, 64 L. ed. 521, 528, 1920).

Since the Kansas Supreme Court based its opinion of affirmance almost entirely upon the ground that Petitioner could maintain no suit upon Respondent's policy until and unless Miller-Morgan, the named assured, elected to contest the rider's validity, and since that proposition was fairly presented to the court by present Respondent, and Miller-Morgan had not, in fact (and has not yet), so elected, Respondent submits the court's language is not dictcum.

Therefore there is no necessity to distinguish *earlier* Kansas decisions which Petitioner asserts to be contrary to *Stanfield v. McBride, supra.* Nevertheless, Respondent calls attention to the following distinguishing features of *Sluder v. National Americans,* 101 Kan. 320, 166 Pac. 482 (1917), the case upon which Petitioner relies.

The Sluder case involved a life insurance policy wherein the plaintiff-beneficiary, sister of the named assured, was specifically designated. As in all life insurance policies, the beneficiary there was the prime object of the assured's bounty; the policy was taken out essentially for the beneficiary's benefit. The policy in the Stanfield case was an automobile liability insurance policy purchased exclusively for the benefit and protection of the named assured (the Kansas "Financial Responsibility Act," making the carrying of such insurance compulsory, had not been enacted at the time in question—Kansas Laws 1939, Chap. 86). The omnibus clause, like nearly all provisions in this or any liability insurance policy, was likewise designed primarily for the named assured's protection — to safeguard him against liability in event his automobile became involved in an accident while being operated by someone who might, for example, be alleged to constitute his agent. The "beneficiary" was not identified in the policy, nor was he ascertainable prior to the accident. And, what is more important, such beneficiary could only be the fortuitous, incidental beneficiary of a contract of insurance purchased, without altruism, solely for the assured's protection. Thus, note the Kansas Supreme Court's characterization of such beneficiary as "a *volunteer* who has no interest in the matter" (*Stanfield v. McBride, supra,* 149 Kan. at 573, 88 P. (2d) at 1005; italics ours). Even

though, in general, the same rules are applicable whether the contract under consideration is a liability insurance policy or a life insurance policy, it is *non sequitur* that the rights of "beneficiaries" under each type of policy are identical.

Another distinction of note is that in the Sluder case the named assured was dead at the time the beneficiary instituted her action. There was no showing or contention that any successor, testamentory or otherwise, was qualified to maintain the action in the named assured's behalf. Therefore, unless the beneficiary were permitted to undertake the suit, the insurance company's wrongdoing would go unpunished and the decedent's wishes would remain thwarted. In the case at bar, Miller-Morgan, the named assured, could have instituted an action against Respondent to cancel the deleting rider at any time from September 5, 1936, the date of accident (R. 59), to July 27, 1937, the date the corporation was disolved (R. 64); and thereafter the corporate trustees could have done so.

Respondent submits the Kansas Supreme Court language, followed by the Circuit Court of Appeals in the case at bar, is not dictum, nor, in any event, does it conflict with the holding in the Sluder case.

II.

The Circuit Court of Appeals Did Not Accord to the Kansas Supreme Court Opinion Any Greater Weight Than It Would Receive in Courts of the State of Kansas.

III.

The Opinion of the Tenth Circuit Court of Appeals Is Not in Conflict With Decisions of the Fourth Circuit Court of Appeals.

Respondent will discuss these two questions together, although they are treated separately in Petitioner's brief.

It should also be percursorily noted that if the controversial language of the Kansas Supreme Court opinion is decision rather than dictum—as Respondent contends and has heretofore urged—then the above questions are moot. In this section of its brief, Respondent is assuming, for argumentative purposes only, that said language constitutes dictum.

Petitioner quotes from two Kansas Supreme Court opinions wherein that court has announced that its dicta binds no one. The quotations are themselves dicta, if tested by the stringent definition of "dictum" urged herein by Petitioner, but admittedly they state the law of Kansas—and of every other common law jurisdiction. Petitioner further cites two decisions, with which Respondent has no quarrel, by the Circuit Court of Appeals for the Fourth Circuit declaring its freedom to determine state law without reference to dicta in opinions of local courts.

Respondent's answer is threefold: (a) In none of the decisions cited by Petitioner is the important distinction between judicial dictum and obiter dictum involved or considered; therefore they are not authoritative on the question of the effect to be accorded judicial, considered dictum. (b) Because dictum *need* not be accepted, it does not necessarily follow that it *must be ignored.* (c) The reasons for the rule stated by Petitioner's authorities are inapplicable to the case at bar.

Considering the last distinction first, the Fourth Circuit Court of Appeals quotes approvingly Mr. Chief Justice Marshall's famous disertation on dictum wherein this explanation is advanced for the rule denying binding effect to obiter dictum (Brief, p. 22):

> "It is a maxim not to be disregarded that general expressions in every opinion are to be taken in connection with the case in which these expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit, where the very point is presented. The reason for this maxim is obvious. The question actually before the court is investigated with care, and considered in its full extent; other principles which may serve to illustrate it are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated."
>
> (*Cohens v. Virginia,* 6 Wheat. 264, 399-400, 5 L. ed. 257, 290, 1821).

In the Stanfield case, Respondent's brief and argument to the Kansas Supreme Court were devoted largely to supporting the trial court's judgment *upon the ground that only Miller-Morgan had any standing in court to attack the validity of the rider.* Present Petitioner fully covered this issue in its reply brief, and again in its petition for rehearing and in its motion to clarify. In its various briefs Petitioner explicitly pointed out to the Kansas Supreme Court all conceivable results which might stem from its decision, specifically calling the court's attention to the Sluder case, *supra.*

Therefore, the court's language in resolving this issue was not mere incidental observation upon collateral matters. The issue was "actually before the court" and was "investigated" with as much "care" as is given any determinative feature of any appeal. Nor could the court possibly have failed to anticipate the effect its language would have upon a second suit between the same liti-

gants wherein Miller-Morgan was made a party. When Petitioner states at page 26 of its brief, that:

> "The question of whether the invalidity of the attempted modification of appellant's [sic] insurance policy could be litigated in an ordinary civil action to which the other party to the contract, Miller-Morgan Motor Company, was a party, was not raised, briefed, or argued",

its assertion is subject to challenge. The issue may not have been urged upon the court in the precise phraseology adopted by Petitioner in the foregoing quotation, but undeniably the Kansas Supreme Court was pressed with the contention that only Miller-Morgan could attack the rider, and that unless it did so Petitioner had no cause of action against Respondent.

That being true, the reason for the dicta rule announced by the Fourth Circuit Court of Appeals as well as by the Kansas Supreme Court is not applicable to the case at bar; wherefore the rule itself is likewise inappropriate here.

Again, the Fourth Circuit Court's refusal to follow state court dictum in a given case, stating it was not *compelled* to do so, is not inconsistent with the Tenth Circuit Court's *voluntarily* determining the applicable Kansas law in the case at bar by resort to the "dictum" of the Stanfield opinion. Similarly, the Kansas Supreme Court rule that its dictum *binds* no one does not *preclude* the Circuit Court of Appeals' reliance upon local dictum as an aid in ascertaining Kansas law. The distinction between what one is compelled to do and permitted to do is obvious. Certainly instances are legion wherein

the Kansas Supreme Court has itself followed its earlier dicta.

Finally, and of controlling importance, the controversial language in the Stanfield opinion is, if not actual holding, at least *judicial* dictum. There is a marked distinction between *judicial* dictum and *obiter* dictum.

This distinction between mere *obiter,* which may, loosely, be characterized as discursive "asides" or passing expressions of opinion by a court or judge on collateral issues not directly involved and not briefed or argued by counsel, frequently constituting illustrative argument originating solely with the court, and *judicial* dictum—a direct expression of considered opinion deliberately passed upon by the court, although not essential to the decision—is well recognized by an abundance of authority. For example, see *Buchner v. Chicago, M. & N. W. Ry. Co.,* 60 Wis. 264 19 N. W. 56, 57-58 (1884); *Zeuske v. Zeuske,* 55 Or. 65, 103 Pac. 648, 651 (1909) (dissenting opinion); *Derosia v. Firland,* 83 Vt. 372, 76 Atl. 153, 155 (1910); *Scovill Mfg. Co. v. Cassidy,* 275 Ill. 462, 114 N. E. 181, 185 (1916); *Perfection Tire & R. Co. v. Kellogg-Mackay Equipment Co.,* 194 Ia. 523, 187 N. W. 32, 35 (1922); *Chase v. American Cartage Co.,* 176 Wis. 235, 186 N. W. 598 (1922); *Taylor v. Taylor,* 162 Tenn. 482, 40 S. W. (2d) 393, 395 (1931); *Crescent Ring Co., Inc. v. Travelers' Indemnity Co.,* 102 N. J. L. 85, 132 Atl. 106, 107 (1926); and *Chance v. Guaranty Trust Co. of New York,* 164 Misc. 346, 298 N. Y. S. 17, 22 (1937). Compare *Carstairs v. Cochran,* 95 Md. 488, 52 Atl. 601 (1902), and *People's Lumber Co. v. Gillard,* 5 Cal. App. 435, 90 Pac. 556, 557 (1907).

A typical expression of the distinction is thus given in *Taylor v. Taylor, supra,* 40 S. W. (2d) at 395:

> "The reply of learned counsel for appellant is that . . . the expressions relied on are dicta only.
>
> "We are unable to agree with counsel in thus restricting the weight to be given the pronouncements quoted. The distinguished writers of these opinions did not use language loosely, or announce lightly constructions of important statutes. It is true that . . . an opinion is properly construed in connection with the facts of the case. But, even though not essential to the decisions of the case, a statement in the opinion upon a point even incidentally involved, where apparently made with consideration and purpose, is at least a judicial dictum, as distinguished from mere obiter dictum, and is entitled to great weight. Moreover, in so far as an opinion announces principles as a basis for the decision, it is in no sense dictum."

Respondent submits the language in the Stanfield opinion with which we are here concerned is, if not actual decision, at least *judicial* dictum. The Kansas decisions cited by Petitioner, announcing generally that dictum binds no one, do not purport to weigh the persuasive value of judicial dictum, and cannot be said to condemn the judgment herein of the Tenth Circuit Court of Appeals.

By the same token, there is no conflict shown between the instant judgment and the Fourth Circuit Court of Appeals' decisions cited by Petitioner. Those decisions merely state that in determining local law the circuit court is not required to heed state court dictum. They make no mention of *judicial* dictum, speaking only of "mere dicta" (Brief, p. 21) and "dicta *or other chance expressions*" (Brief, p. 23; italics added) which indi-

cates, plainly, that the Fourth Circuit Court of Appeals was considering mere *obiter* dictum. If such expressions suggest a "conflict" between the Fourth and Tenth Circuit Courts of Appeal, Petitioner might well have enhanced its conflict by referring to other decisions from other circuits which take the same, traditional view towards *obiter* dictum—as, for example, *Parker Bros. v. Fagan,* 68 F. (2d) 616 (C. C. A. 5, 1934), and *Buder v. New York Trust Co.,* 107 F. (2d) 705 (C. C. A. 2, 1939). For that matter, see *Slatterlee et al. v. Harris et al.,* 60 F. (2d) 490, 491 (C. C. A. 10, 1932), decided by the Tenth Circuit Court of Appeals itself.

There is no necessity whatever for this Court to reaffirm its long held position as to the effect of obiter dictum. Nor is the fact that *Erie Rly. Co. v. Tompkins,* 304 U. S. 64, 82 L. ed. 1188 (1939) is of fairly recent vintage, of any moment. The precise question as to the effect of state dictum upon federal decision frequently arose under *Swift v. Tyson,* 16 Pet. 1, 10 L. ed. 865 (1842), which decision, *so far as it went,* laid down the same rule for which the Erie Railroad case is known. This Court's determination of the problem is unambiguous and needs no restating. See, for example, *Carroll v. Carroll,* 16 How. 275, 286-287, 14 L. ed. 936, 941 (1852).

Equally clear, Respondent submits, is the rule as to judicial, considered dictum. Squarely in point, and fully supporting the action of the Tenth Circuit Court of Appeals in the case at bar, is *Hawks v. Hamill,* 288 U. S. 52, 58, 77 L. ed. 610, 617 (1933) where Mr. Justice Cardozo, speaking for This Court, wrote:

> "Indeed the radiating potencies of a decision may go beyond the actual holding. A wise comity has decreed that deference shall at all times be owing,

though there may be lacking, in the circumstances, a strict duty of obedience. [Citation] An opinion may be so framed that there is doubt whether the part of it invoked as an authority is to be ranked as a definite holding or merely a *considered* dictum. What was said in Okmulgee v. Okmulgee Gas Co., 140 Okla. 88, 282 Pac. 640, supra, as to the meaning of perpetuities, was probably *intended* to be a definitive holding. [Citation] To be sure there is room for argument that limiting distinctions will have to be drawn in the future. We must leave it to the courts of Oklahoma to declare what they shall be. But the result will not be changed though the definition of perpetuities be something less than a decision. *At least it is a considered dictum, and not comment merely obiter.* It has capacity, though it be less than a decision, to tilt the balanced mind toward submission and agreement." (Emphasis supplied)

It was held, in *Yoder v. Nu-Enamel Corporation,* 117 F. (2d) 488, 489 (C. C. A. 8, 1941):

"In the application of a state statute, the federal courts are, of course, bound by the construction made by the courts of that state. [Citation] And the obligation to accept local interpretations extends not merely to definitive decisions, but to *considered* dicta as well. [Citations] Indeed, under the implications of Erie Railroad Co. v. Tompkins, 304 U. S. 64 . . . and West v. American Telephone and Telegraph Co., 61 S. Ct. 179, 85 L. Ed. 139, where direct expression by an authorized state tribunal is lacking, it is the duty of the federal court, in dealing with matters of either common law or statute, to have regard for any persuasive data that is available, such as compelling inferences or logical implications from other related adjudications *and considered pronouncements.* The responsibility of the federal courts, in matters of local law, is not to formulate the legal mind of the state, but merely to ascertain and apply it. Any convincing

> manifestation of local law, having a clear root in judicial conscience and responsibility or obvious implication and inference, should accordingly be given appropriate heed."

Compare, *Jones v. Habersham,* 107 U. S. 174, 179, 27 L. ed. 401, 403 (1883), holding that federal courts, in following state law, will treat as "decision" any issue which the state court thought involved, and determined, even though the decision may literally have been de hors the issues presented by the case. See, also, *National Bank of Oxford v. Whitman,* 76 Fed. 697 (S. D. N. Y., 1896), which follows, by according it strong persuasive force, a "considered" dictum of the Kansas Supreme Court. And compare *Shanks v. Travelers' Ins. Co.,* 25 F. Supp. 740 (N. D. Okla., 1938), wherein Mr. Justice Kennamer follows a state court opinion on a point which the state court need not have determined, and *Cold Metal Process Co. v. McLouth Steel Corp.,* 126 F. (2d) 185 (C.C.A. 6, 1942).

Respondent submits: (a) there is no conflict between the Tenth Circuit Court's *voluntarily* following a considered, *judicial* dictum of the Kansas Supreme Court, and the Fourth Circuit Court's refusing to be bound by *obiter* dictum, nor between the action of the Tenth Circuit Court and the Kansas Supreme Court's concession that its *obiter* dictum binds no one; (b) the Tenth Circuit Court of Appeals had ample precedent for giving persuasive effect to the instant judicial dictum; and (c) the position of This Court is well known and requires no reiteration to avoid any supposed conflict in circuit court practices.

IV.

The Circuit Court of Appeals Did Not Err in Its Interpretation of the Kansas Supreme Court Opinion in Stanfield v. McBride.

Petitioner's final contention is that the Tenth Circuit Court's opinion misinterprets the decision of the Kansas Supreme Court in *Stanfield v. McBride, supra.*

First (Brief, p. 24), Petitioner attacks the rule of *Stanfield v. McBride, supra,* as undesirable in that it sanctions fraud and permits a wrong without a remedy. Respondent does not concede such accusation. However, a complete answer, in any event, is that the *desirability* of the Kansas rule of law is not open to inquiry upon petition for writ of certiorari. Whether the rule of *Stanfield v. McBride, supra,* be good or bad, if it is Kansas law the Tenth Circuit Court of Appeals cannot be criticised for following it.

Petitioner next says the Kansas trial court, in the Stanfield case, placed its judgment upon the ground that the relief sought was beyond the scope of a garnishment proceeding; that Respondent perfected no cross-appeal from that judgment; and that, for this reason, the Kansas Supreme Court was powerless to do more, in affirming the judgment below, than approve the trial court's conclusion (Brief, pp. 25-26). Yet Petitioner then goes on to urge that the holding of the Kansas Supreme Court was that Petitioner could not recover in that case because Miller-Morgan was not a party thereto (Brief, p. 26). These arguments appear irreconcilably inconsistent to Respondent. Nor, as has heretofore been demonstrated, is either argument meritorious.

Petitioner also states (Brief, p. 29) that the case at bar is "vastly different from" *Stanfield v. McBride, supra,* because in the instant action there is a finding that the rider was attached without the consent of Miller-Morgan.

As a matter of fact, however, precisely the same evidence was before the court in each case.

Thus, in *Stanfield v. McBride, supra,* Petitioner attempted to introduce testimony of G. C. Temple to establish that the omnibus clause was deleted without Miller-Morgan's consent, which testimony was transcribed into the record by way of proffer (R. 115-117). This evidence is substantially identical to Temple's testimony in the instant case (R. 65-72). See *Stanfield v. McBride, supra,* 149 Kan. at 569, 88 P. (2d) at 1003:

> "Appellant at the time of the trial in the garnishment proceeding offered testimony of G. C. Temple, office manager of the motor company, for the purpose of showing that the rider had been attached to the insurance contract without the knowledge of the motor company and without its assent."

Plainly the Kansas Supreme Court considered both contentions advanced by Petitioner in the instant case: that the rider was attached without consideration or mutual assent, and that Respondent was guilty of fraud.

The Kansas Supreme Court disposed of the fraud issue in these words (149 Kan. at 572, 88 P. (2d) at 1005):

> "Complaint is made of the exclusion of testimony to show the rider was attached through fraud . . .
>
> "But assuming that the agent of the insurance company [Respondent] was guilty of fraud, the endorsement by which the omnibus clause was deleted would be voidable only, not void. . . .
>
> "The evidence in this case fails to show that Miller-Morgan has elected to rescind the change in the policy. It does not show they are dissatisfied with the policy in its present form. . . . As a condition precedent to his right of recovery it was necessary for plaintiff [Petitioner] to show that the omnibus clause had

not been deleted from the original contract. That fact has not been established."

The second issue was likewise passed upon by the Kansas Supreme Court (149 Kan. at 573-574, 88 P. (2d) at 1005-1006):

> "Appellant [Petitioner] contends that the endorsement by which the coverage was deleted is void because it was unsupported by any consideration. But the question is not whether a contract or a modification thereof must be supported by consideration, but whether a volunteer who has no interest in the matter can raise the question. . . .
>
> "As he [Petitioner] had no knowledge of the contract and had in nowise changed his position by reliance thereon, and had no accrued interest in the contract, he was at that time in the position of a stranger to the contract and could not raise the question of the sufficiency of the consideration."

Respondent therefore submits there is no factual distinction between *Stanfield v. McBride, supra,* and the case at bar. It is not material that here the evidence of fraud and lack of mutual consent was introduced and held, by the Circuit Court of Appeals, irrelevant, and that in *Stanfield v. McBride, supra,* such evidence was excluded and held, by the Kansas Supreme Court, inadmissible.

In reply to Petitioner's statement (Brief, p. 26) that the holding of the Kansas Supreme Court in the Stanfield case embraced issues neither raised, briefed, nor argued, suffice to quote from the conclusion of Respondent's brief to the Kansas Supreme Court:

> "The insurance contract here involved was entered into between Miller-Morgan and Employers [Respondent]. The rider was attached to the policy,

deleting omnibus coverage, prior to the accident which gave rise to McBride's judgment against Strunk.

"With reference to that contract of insurance, McBride [Petitioner's assured] is not even a third party —it is a fourth party. By what, for want of a better term, we shall call tandem subrogation, McBride seeks to possess itself of the rights of Strunk, and, having accomplished this, then to possess itself of the rights of Miller-Morgan, and finally, having achieved both these accomplishments through its garnishment affidavit, to institute litigation against Employers to set aside the rider. McBride has not and can not produce any authority which warrants this action. *Whether it brings a direct action against Employers* or an ancillary garnishment proceeding, *McBride has no standing in court to complain of any lack of consideration or fraud affecting a contract entered into between Miller-Morgan and Employers.* The rider was attached to the policy prior to the date of the accident, *has never been objected to or set aside by Miller-Morgan,* and McBride cannot enforce its judgment against employers." (Italics added)

As for Petitioner's present "interpretation" of the Stanfield opinion as being premised entirely upon the fact that Miller-Morgan was not a party to the action, Respondent feels constrained to quote from the petition for rehearing filed by Petitioner with the Kansas Supreme Court. In that petition present Petitioner cited *Sluder v. The North Americans, supra,* and *Riddle v. Rankin,* 146 Kan. 316, 69 P. (2d) 722 (1937), among other authorities, and suggested all the dire consequences of the ruling in that case which are now pressed upon This Court. Directly to the present point, moreover, Petitioner did not then treat the Stanfield opinion as technically confined to garnishment

proceedings to which Miller-Morgan was not a party. Instead, Petitioner then interpreted the Stanfield decision exactly as the Tenth Circuit Court of Appeals interpreted it in the case at bar:

> "The basis for the court's decision in this case was its conclusion that a third party beneficiary who had no indefeasible interest in a contract cannot assert that a modification or cancellation of the contract was ineffective for want of consideration, fraud practiced upon the promisee or lack of assent of the promisee to the modification or cancellation." (Petition for Rehearing, p. 1)

Apart from this practical construction by Petitioner, Respondent submits the Tenth Circuit Court of Appeals' interpretation of the Stanfield opinion is eminently correct. The rationale of that decision, as even a cursory reading of the opinion will disclose, is not merely Miller-Morgan's absence as a litigant but, rather, its failure to attack the rider's validity.

Note, for example, the court's statement (149 Kan. at 570, 88 P. (2d) at 1004):

> "As the original parties had a right to modify or change the policy before the interest of any potential beneficiaries had accrued under the contract, it is difficult to suggest any ground upon which *the plaintiff McBride* [Petitioner] can question such change." (Italics added)

The clinching language, though, is contained on pages 573 and 574 of the opinion (88 P. (2d) at 1005-1006). The strongest argument urged by present Petitioner against validity of the rider was that it was attached without consideration or mutual assent—in which event the rider would be void, not merely voidable as in event of

fraud. In holding Petitioner could not defeat the rider even though it lacked consideration, the Kansas Supreme Court said:

> "Appellant contends that the endorsement by which the coverage clause was deleted is void because it was unsupported by any consideration. But the question is not whether a contract or a modification thereof must be supported by a consideration, but whether a volunteer who has no interest in the matter can raise the question.
>
> "We hold, therefore, that the parties had a lawful right to limit the coverage by attaching a rider to the policy, and that the plaintiff could not question the transaction. As he had no knowledge of the contract and had in nowise changed his position, he was at that time in the position of a stranger to the contract, and could not raise the question of the sufficiency of the consideration."

How, Respondent inquires, could the court's holding be made clearer? "We hold," the court states, thereby adopting the strongest language available to appellate tribunals. What is held? "We hold . . . that the plaintiff could not question the transaction . . . he was . . . in the position of a stranger to the contract, and could not raise the question of the sufficiency of the consideration."

This holding is not restricted to litigation in which Miller-Morgan is not a party. The stated basis for the decision is that *Petitioner is a stranger to the contract* and therefore has no standing to attack the rider—and that is certainly true whether Miller-Morgan is or is not a party to the suit in which Petitioner attempts to maintain such attack. *Petitioner's relationship to the insurance contract cannot possibly be affected by the identity of the parties to a law suit.*

Why does the Kansas Supreme Court, then, emphasize the fact that Miller-Morgan was not a party to that action? Because, not being a party thereto, Miller-Morgan was not therein exercising its right of rescision. And since that right was Miller-Morgan's, not Petitioner's, and could be exercised only by Miller-Morgan, judgment was entered for Respondent. In this connection, notice these excerpts from the Kansas Supreme Court opinion:

> "But assuming that the agent of the insurance company was guilty of fraud . . . *The evidence in this case fails to show that Miller-Morgan has elected to rescind the change in the policy.*" (149 Kan. at 572; 88 P. (2d) at 1005)
>
> "The Miller-Morgan Motor Company are not parties to this lawsuit. The policy was issued to them. *They have made no complaint as to the change in the policy,* and, so far as the record shows, they were satisfied with the deletion of the omnibus clause." (149 Kan. at 570; 88 P. (2d) at 1003-1004)
>
> "They [Miller-Morgan] are not parties to the present proceedings. As the original parties had a right to modify or change the policy before the interest of any potential beneficiaries had accrued under the contract, it is difficult to suggest any ground *upon which the plaintiff McBride* [Petitioner] can question such change." (149 Kan. at 571; 88 P. (2d) at 1004)

Certainly no extended argument is necessary to establish that Petitioner cannot avoid the Stanfield opinion merely by joining Miller-Morgan's successors as *passive* parties defendant in the case at bar. Were those successors parties *plaintiff,* or had they cross-petitioned for the affirmative relief or rescission, a different problem would have been presented. But the instant record contains no evidence of Miller-Morgan's desire to rescind.

Not one of the Miller-Morgan successors named herein as defendants even filed an answer (R. 125). Nor was there any occasion for their doing so since Petitioner's petition prayed for no relief whatever against them (R. 12-13). Of those five successor-trustees (R. 7, 64), only two testified. W. F. Miller testified that at no time, either as president of Miller-Morgan or as trustee of the defunct corporation, had he ever complained of the rider (R. 77). Mr. Morgan testified to the same effect, admitting that to his knowledge Miller-Morgan had never taken steps to rescind, and that he, personally, had no present complaint (R. 92; 113-114). Hence, not only is the instant record barren of evidence that Miller-Morgan has elected to rescind, but it affirmatively shows Miller-Morgan has *not* done so.

The basic premise, Respondent submits, of the Stanfield decision is that only Miller-Morgan has any standing in court to attack the rider. Under no circumstances can Petitioner, a stranger to the policy, do so. That the Stanfield case was a garnishment action was material *only* because Miller-Morgan was not a party thereto and the proceedings therefore lacked the only litigant capable of attacking the rider. And, in turn, Miller-Morgan's absence from the suit was material *only* because it was therefore not itself seeking rescission therein. Hence, both the "garnishment" and "party" features of the Stanfield case were material for one and the same reason: Miller-Morgan, the only person capable of doing so, was not a litigant therein seeking rescission of the rider.

By the same token, under the Stanfield case the rider's invalidity is not an issue available to Petitioner in *any* action unless and until Miller-Morgan is made a party thereto *and elects therein to litigate the issue of the rider's validity.*

Petitioner failed in the Stanfield case because Miller-Morgan was not a party thereto and was therefore not seeking rescission therein. It was inevitable that Petitioner must fail again in the case at bar because Miller-Morgan, although made a party hereto by the summoning of its successors, did not seek or elect herein to avoid the rider or litigate the issue of the rider's validity. Merely joining the Miller-Morgan successors as passive parties defendant herein is no substitute for the requisite proof of an election by Miller-Morgan to avoid the rider.

Therefore, Respondent submits, the Tenth Circuit Court of Appeals did not do "violence" to the Stanfield opinion, but, on the contrary, very properly entered judgment against Petitioner.

V.

Conclusion.

Petitioner's brief fails to demonstrate any conceivable conflict between the decision of the Tenth Circuit Court of Appeals and decisions either of the Fourth Circuit Court of Appeals or of the Kansas Supreme Court.

At best, Petitioner suggests only that the Tenth Circuit Court of Appeals, in ascertaining and applying Kansas law, misinterpreted the decision in *Stanfield v. McBride, supra.* Whether or not any such error would solicit the issuance of a writ of certiorari, Respondent submits that unquestionably the Tenth Circuit Court's interpretation of the Stanfield opinion is entirely correct.

Wherefore, it is respectfully submitted that the petition for writ of certiorari be denied.

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